

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY JEFFERSON,	§
	§
Defendant Below-	§ No. 444, 2008
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Sussex County
	§ Cr. ID Nos. 0604018844
Plaintiff Below-	§
Appellee.	§

Submitted: November 17, 2008

Decided: February 4, 2009

Before **HOLLAND, BERGER, and JACOBS**, Justices.

ORDER

This 4th day of February 2009, upon consideration of the appellant's opening brief and the State's motion to affirm, it appears to the Court that:

(1) The appellant, Gary Jefferson, filed this appeal from the Superior Court's denial of his first motion for postconviction relief. The State has filed a motion to affirm the judgment below on the ground that it is manifest on the face of Jefferson's opening brief that the appeal is without merit. We agree and affirm.

(2) The record reflects that Jefferson was charged with first degree kidnapping and second degree rape. On the morning of his preliminary hearing, he asked a cellmate to find someone to kill the complaining witness.

Upon his release, the cellmate told police of Jefferson's request. Police wired the cellmate with a recording device. He then visited Jefferson in prison and recorded Jefferson's second request for help finding someone to kill the complainant in his case. Jefferson thereafter was charged with criminal solicitation. On December 4, 2006, Jefferson pled no contest to third degree rape and guilty to first degree criminal solicitation and to violation of probation on an unrelated DUI. In exchange for his plea, the State dismissed the other charges. The Superior Court sentenced Jefferson to a total period of thirty-three years at Level V incarceration, to be suspended after serving nine years for decreasing levels of supervision. This Court affirmed on direct appeal.¹ Thereafter, Jefferson filed a motion for postconviction relief, requesting that he be allowed to withdraw his guilty plea based on his trial counsel's ineffectiveness. The Superior Court, after obtaining responses from both the State and defense counsel, denied Jefferson's motion. This appeal followed.

(3) In his opening brief on appeal, Jefferson argues that the Superior Court erred in denying his postconviction motion because his trial counsel was ineffective for failing to file a motion to suppress any evidence of Jefferson soliciting murder based on a violation of his Sixth Amendment

¹ *Jefferson v. State*, 2006 WL 2600542 (Del. Sept. 10, 2007).

right to counsel. Jefferson contends that the State was prohibited from deliberately eliciting the incriminating statements made by him to his former cellmate, who was acting as the State's agent, without the presence of Jefferson's counsel.

(4) This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.² To prevail on a claim of ineffective assistance of counsel in the case of a guilty plea, a defendant must establish that (i) his trial counsel's representation fell below an objective standard of reasonableness; and (ii) but for counsel's unprofessional errors, the defendant would not have pled guilty but would have insisted on going to trial.³ The defendant must set forth and substantiate concrete allegations of actual prejudice.⁴ Moreover, there is a "strong presumption" that counsel's representation was professionally reasonable.⁵

(5) In this case, the Superior Court concluded that defense counsel's decision not to file a suppression motion was both reasonable and appropriate. The Superior Court agreed with counsel's conclusion that

² *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996).

³ *Albury v. State*, 551 A.2d 53, 58-59 (Del. 1988) (citing *Hill v. Lockhart*, 474 U.S. 52 (1985)). See also *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

⁴ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁵ *Strickland v. Washington*, 466 U.S. at 689.

Jefferson's Sixth Amendment right to counsel, as to the solicitation charge, had not attached at the time his former cellmate, acting on the State's behalf, visited Jefferson in prison.⁶ Moreover, even if counsel had been successful in moving to suppress that second conversation, Jefferson's former cellmate still would have been permitted to testify as to his first conversation with Jefferson, which Jefferson initiated and which involved no State action.

(6) After careful consideration of the parties' arguments on appeal, we find it manifest that the judgment below should be affirmed on the basis of the Superior Court's well-reasoned decision dated August 5, 2008. The Superior Court did not abuse its discretion in concluding that Jefferson had established neither cause nor prejudice with respect to his counsel's failure to file a pretrial motion to suppress.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁶ *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (holding that the right to counsel is "offense specific" and, thus, even though right may have attached as to one charged offense, it had not attached with regard to other offenses under investigation for which no charges had yet been filed).